

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-184**

STANLEY D. WOLFE

APPELLANT

**VS. FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

ENERGY AND ENVIRONMENT CABINET

APPELLEE

*** **

The Board at its regular April 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 15, 2016, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **SUSTAINED to the extent therein.**

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 20th day of April, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Leesa B. Moorman
Mr. Stanley D. Wolfe
Ms. Sherry Butler
Ms. Lynn Gillis

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2015-184**

STANLEY D. WOLFE

APPELLANT

**V. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

ENERGY AND ENVIRONMENT CABINET

APPELLEE

** ** *

This matter came on for an evidentiary hearing on February 18, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Stanley D. Wolfe, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Energy and Environment Cabinet, was present and represented by the Hon. Leesa B. Moorman. Appearing as agency representative was Lynn Gillis.

This matter involves the 17-day suspension given to the Appellant by letter dated June 29, 2015, the suspension to run from June 30, 2015, through close of business July 23, 2015. A copy of the letter is attached hereto and incorporated herein as **Recommended Order Exhibit A**.

The Appellant was suspended from his position as an Environmental Scientist III for unsatisfactory performance of duties by failing to meet the minimum requirements of his class specification at all times, namely because of the suspension of his driver's license for a period of time for having received a DUI 1st Offense. The Appellant also appealed the action of his Assistant Director Nina Hockensmith when she instructed him to take off three days of leave while his disciplinary action was being decided.

BACKGROUND

1. The Appellee's first witness was **Lynn Gillis**. She is the Assistant Director of the Office of Human Resource Management within the Department for Environmental Protection, and has been named as a designated Appointing Authority. She authored the suspension letter.

2. Gillis testified that she imposed the suspension because, after learning of the suspension of Appellant's driver's license for 30 days, she felt he could not perform the essential

functions of his job. By failing to have a driver's license, she felt he did not meet the minimum requirements of the job description. She further added that a portion of Appellant's duties involved driving into the field to inspect various facilities and carry out other activities. Another portion of his job duties were to work in the office, write reports and perform back-up duties for others.

3. The witness then identified Appellee's Exhibits 2 and 3, the Job Specification for Environmental Scientist III and a Position Description for that job, respectively. In pertinent part, the Job Specification, under "ADDITIONAL REQUIREMENTS" states:

Upon appointment, employees in this class may be required to maintain a valid driver's license and required to drive a licensed vehicle. This status may be necessary for the length of time in this class.

4. The Kentucky Personnel Cabinet's Position Description for Environmental Scientist III (Appellee's Exhibit 3) sets forth the position description and, at page 2, states that the holder of the position must maintain a valid driver's license. This Position Description also provides that 40% of the job duties require performing In-Depth Title V Inspections in the field, leaving the other 60% of duties for various in-office tasks.

5. Gillis then was directed to Appellee's Exhibit 5, the Procedures Manual for the Operation and Use of State Vehicles, EEC-501-01. She pointed out that Section 1: General Procedures, (A) provides that the "operator of a state vehicle shall be an employee or agent of the Commonwealth and shall hold a valid operator's license appropriate for the class of vehicle he or she is operating....Any operator of a state vehicle whose driver's license has expired or has been suspended or revoked shall immediately report this fact to GAPS HUMAN RESOURCES and his or her immediate supervisor..." The Appellant did report the DUI to his supervisor, Natasha Parker, on Monday, March 2, 2015. Likewise, he notified his second-line supervisor, Jarrod Bell, on Friday, April 10, 2015, of the license suspension. He mentioned to Bell that he had a scheduled court date for June 23, 2015, and expected his license to be suspended for 30 days. Thereafter, Appointing Authority Lynn Gillis was notified.

6. Although the notification was made to Gillis on June 23, 2015, she testified that the suspension letter was not actually issued until June 29, 2015, due to lack of the Cabinet Secretary's availability to sign the letter. Thus, there were three work days between Gillis' learning of the DUI and the issuance of the letter. Therefore, she instructed the Appellant to take leave for those three work days until the letter was actually given to him. She explained this directive as due to the fact that the Appellant had no license and therefore did not meet the minimum requirements for the job.

7. The witness then explained that on or about July 27, 2015, she did receive proof from the Appellant that his license had been reissued and was in good standing.

8. On cross-examination, the witness was asked to address the situation of a Rick McCune, another employee of this Cabinet. She confirmed she had learned at some point that

Mr. McCune had been without a valid driver's license for a period of approximately three years and four months. She stated that upon learning of this, he was given a 30-day suspension sometime in early August 2015. However, she stressed the difference between the Appellant's case and Mr. McCune's as being that she was aware of the Appellant's failure to have a valid driver's license and thereupon immediately imposed a suspension. This was in contrast to her not knowing of Mr. McCune's failure to have a driver's license, but upon learning of it, imposing a suspension.

9. On re-direct, the witness further differentiated between the two cases by saying that McCune had gotten his driver's license back, when he was thereafter suspended for failing to tell the Cabinet about his prior loss of license.

10. The Appellee's next witness was **Nina Hockensmith**. She is employed as an Assistant Director in the Division of Environmental Program Support. She serves as the Human Resources Liaison for her department, and is the one who recommended the suspension of the Appellant to Gillis.

11. She testified the driver's license is a part of the minimum requirements of the job, and further stated that progressive discipline was not used in this instance since this was not a performance issue. She informed the Appellant he would need to take three days of leave while waiting for the suspension letter to be issued.

12. The Appellee's next witness was **Eric Eisiminger**. The witness stated he became the Branch Manager over the Division of Air Quality where the Appellant worked at approximately the same time the Appellant received the DUI. He stated that he was aware of this and termed the Appellant a "good employee." He also explained that the Appellant's job requires him to go out in the field for various reasons, and that he is assigned a state-owned vehicle.

13. On cross-examination, the witness answered it was a possibility that the Appellant could have been directed to remain in the office during his 17-day suspension and could have been doing other work during that time.

14. The Appellee then called **Appellant Stanley D. Wolfe** as its next witness. He merely confirmed that he had notified his supervisor of the DUI the day after having been arrested. The agency closed.

15. The Appellant called **Natasha Parker** as his first witness. She was the Appellant's first-line supervisor at the time of his DUI arrest. She also stated that it was quite possible that sufficient office work could have been found for the Appellant to perform during the 17-day suspension.

16. The Appellant's next witness was **Jarrold Bell**. He was the second-line supervisor of the Appellant for a portion of 2015. However, he offered no meaningful testimony.

17. The **Appellant** then called himself. He argued the 17-day suspension was excessive and that he quite possibly could have been performing the other 60% of his duties in the office without a driver's license.

FINDINGS OF FACT

1. The Hearing Officer finds that the Appellant promptly notified his supervisor after being cited for a DUI 1st offense.

2. Both the Job Specification and the Position Description for the Appellant's position of Environmental Scientist III required him to maintain a valid driver's license while in the position.

3. During the 17 work days of the suspension, the Appellant did not have a valid driver's license.

4. The Appellant's Job Description provides that 40% of his duties are to be performed out of the office, in the field, while the other 60% of his duties can be performed in the office.

5. The Appellant's first and second-line supervisors, Parker and Bell, testified it was possible, though not a certainty, that sufficient work was available for the Appellant to perform in the office during his suspension period.

6. The Hearing Officer finds it highly unlikely that over a period in excess of three weeks (17 work days), the Appellant would not have been required to perform some of his duties outside the office.

7. The Hearing Officer finds the Appellant's failure to maintain a valid driver's license at all times is a failure to meet the minimum requirements of his job specification and constituted unsatisfactory work performance under 101 KAR 1:345.

8. The Appellant was instructed to take three days' leave while they were waiting for the suspension to issue.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law the Appellee has carried its burden of proof by a preponderance of the evidence to show the Appellant's suspension was justified under all surrounding circumstances.

2. The Appellee had no authority to order the Appellant to use three days of leave while they waited for his suspension to be finalized. The Appellant shall be reimbursed for the three days' leave (compensatory or annual) which he was forced to use for the three days.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **STANLEY D. WOLFE V. ENERGY AND ENVIRONMENT CABINET, (APPEAL NO. 2015-184)** be **SUSTAINED to the extent** that he be reimbursed for the three days' leave he was forced to use without authorization and **DISMISSED** as to the 17-day suspension. The Appellant shall be reimbursed any time leave time he used to attend the evidentiary hearing and pre-hearing conferences. KRS 18A.105 and KRS 18A.095(25).

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

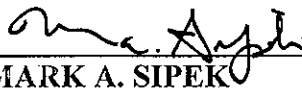
Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer R. Hanson Williams** this 15th day of March, 2016.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Leesa B. Moorman
Mr. Stanley D. Wolfe



ENERGY AND ENVIRONMENT CABINET

Steven L. Beshear
Governor

Capital Plaza Tower
500 Mero Street, 12th Floor
Frankfort, Kentucky 40601
Phone: (502) 564-3350
Fax: (502) 564-7484

Leonard K. Peters
Secretary

June 29, 2015

Stanley David Wolfe
105 Crossing View Drive
Berea, Kentucky 40403

Suspension
57-129-02/ 30046576
Personnel # 192881
Effective date: June 30, 2015

Dear Mr. Wolfe:

Pursuant to KRS 18A.095, you are notified that you are suspended from duty and pay for a period of seventeen (17) working days, effective beginning of business Tuesday June 30, 2015 through close of business Thursday, July 23, 2015. Your suspension will be complete and you will return to work at your normal schedule beginning of business Friday, July 24, 2015.

Pursuant to 101 KAR 1:345, Section 1 and 4 and you are being suspended from your position as Environmental Scientist III, in the Department for Environmental Protection, Division for Air Quality, Field Operations Branch, for unsatisfactory performance of your duties by failing to meet the minimum requirements of your class specification at all times.

Upon your own admission, on June 23, 2015, your driver's license was suspended for Driving Under the Influence/1st Offense in the Madison County District Court, citation number 15-F-00174. Your duties as an Environmental Scientist III require you to operate a state vehicle in order to perform field inspections. The class specification for an Environmental Scientist III, defines among others, additional requirements that upon appointment, employees in this class may be required to maintain a valid driver's license and the requirement may be necessary for the length of time in this class. This requirement is specifically designated in your position description as an essential function of your position. Therefore, upon final verification, it is determined that for a significant period of time, approximately 17 working days, you could not perform the full requirements of the class specification.

On June 2, 2015, you acknowledged receipt of the State Vehicle Policy (EEC-501-00), the Personal Vehicle Policy (EEC-502-00) and the Procedures Manual for the Operation and Use of State Vehicles (EEC-501-01) with previous acknowledgements of the former NREPC Vehicle Policy signed on June 19, 2006 and May 17, 2007.

After the date of July 23, 2015 (the earliest date you are eligible to have your driver's license reinstated) and upon your return to work, you are required to provide the Division of Human Resources a copy of your reinstated driver's license to the Division of Human Resources immediately upon your return to work.

Future instances of lack of good behavior may result in disciplinary action up to, and, including dismissal.

For your information, the Kentucky Employee Assistance Program (KEAP) is a voluntary and confidential assessment and referral service for state employees. This service may help you with any personal problems that may be affecting our job performance. KEAP can be reached at (800) 445-5327 or (502) 564-5788.

In accordance with KRS 18A.095 you may appeal this action to the Personnel Board within sixty (60) days after receipt of this notice, excluding the date notification was received. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,



Lynn Keeling Gillis
Designated Appointing Authority
Energy and Environment Cabinet

cc: Secretary, Personnel Cabinet
Personnel File

Attachments: Appeal Form

I, S. David Wolfe, have received the suspension letter dated, June 29, 2015.

Stanley D Wolfe
S. David Wolfe

6/29/15
Date

Robert Noel
Delivered by

6/29/15
Date

John Baker
Witness

29 JUN 15
Date

APPEAL FORM*****ALL APPEALS TO THE PERSONNEL BOARD MUST BE ON THIS FORM*****

This appeal to the Kentucky Personnel Board is hereby filed pursuant to the provisions of KRS Chapter 18A. The following information is provided as required by law.

For Official Use Only

NAME: _____				
(LAST)	(FIRST)	(MIDDLE)	(MAIDEN)	(SOC. SEC. NO.)
HOME ADDRESS: _____				
(STREET)	(CITY)	(STATE)	(ZIP CODE)	
WORK STATION ADDRESS: _____				
(STREET)	(CITY)	(STATE)	(ZIP CODE)	
HOME PHONE NO: _____		WORK STATION PHONE NO: _____		
CABINET OR AGENCY: _____				
NAME OF APPOINTING AUTHORITY: _____				

REPRESENTED BY ATTORNEY:	<input type="checkbox"/> NO	<input type="checkbox"/> YES
ATTORNEY'S NAME, ADDRESS AND PHONE NO: _____		

I AM A:	<input type="checkbox"/> Classified employee	<input type="checkbox"/> Unclassified employee
	<input type="checkbox"/> Applicant for employment	<input type="checkbox"/> Eligible on register

I AM APPEALING THE FOLLOWING ACTIONS: (Check appropriate box or boxes)		
<input type="checkbox"/> DISMISSAL	<input type="checkbox"/> DEMOTION	<input type="checkbox"/> SUSPENSION
<input type="checkbox"/> DISCIPLINARY FINE	<input type="checkbox"/> INVOLUNTARY TRANSFER	<input type="checkbox"/> LAYOFF
<input type="checkbox"/> EMPLOYEE EVALUATION	<input type="checkbox"/> REALLOCATION	<input type="checkbox"/> RECLASSIFICATION
<input type="checkbox"/> APPLICANT REJECTION	<input type="checkbox"/> DENIED, ABRIDGED OR	<input type="checkbox"/> DISCRIMINATION Circle those
<input type="checkbox"/> REMOVAL FROM REGISTER	IMPEDED RIGHT TO INSPECT OR	that apply [race, color, religion, ethnic
	COPY RECORDS	origin, sex, disability, political, age
		(over 40)]
<input type="checkbox"/> OTHER PENALIZATION (Specify): _____		